

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL J. NOLL)	
Claimant)	
VS.)	
)	
LINCOLN GRAIN, INC.)	Docket No. 172,114
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed from an Award entered by Administrative Law Judge Bryce D. Benedict on April 23, 1997. The Appeals Board heard oral argument October 15, 1997.

APPEARANCES

Claimant appeared by and through his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by and through its attorney, Jeffrey D. Slattery of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and has adopted the stipulations contained in the Award.

ISSUES

The Administrative Law Judge awarded benefits for 15 percent permanent partial impairment to claimant's left lower extremity based upon an average weekly wage sufficient to entitle claimant to the maximum weekly benefit of \$278 per week in effect at the time of his injury. The Administrative Law Judge also awarded future medical benefits upon proper application and found that claimant had failed to establish that there had been an underpayment of the temporary total disability benefits owed.

On appeal, claimant asks the Appeals Board to review the findings related to the nature and extent of disability. Claimant also argues that an award should be made for future benefits without the necessity of further application. Specifically, claimant asks for an award allowing claimant to purchase certain orthotic boots which have been prescribed. Finally, claimant contends that there has been an underpayment of temporary total disability benefits and asks the Appeals Board to so find.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed.

The Administrative Law Judge awarded benefits for a 15 percent functional disability of the left lower extremity on the basis of an independent medical evaluation ordered by the Administrative Law Judge and performed by Terrence Pratt, M.D. Claimant argues Dr. Pratt's opinions may not be considered because he did not testify by deposition or otherwise.

Dr. Pratt was designated as an independent medical examiner in accordance with K.S.A. 44-510e. That statute specifically provides that any report from such independent medical examinations shall be considered. The Appeals Board has previously held that the statute is procedural and that it applies for accidents prior to July 1, 1993. See Clem v. Roadway Express, Docket No. 183,119 (March 1996) and Domann v. Shawnee Mission Ford, Inc., Docket No. 137,117 (April 1996). The Appeals Board also finds it reasonable to have relied upon the independent medical examination completed by a physician chosen by the Administrative Law Judge. The Appeals Board agrees with and affirms the finding that claimant sustained a 15 percent permanent partial impairment of the left lower extremity.

The Appeals Board also agrees with the decision to order future medical benefits upon proper application only. Respondent has an ongoing responsibility to provide reasonable necessary medical care to the claimant. Claimant points out that the treating physician has indicated claimant will need special orthotic boots in the future. The Appeals Board, nevertheless, considers it appropriate to require an application for approval for benefits in the event the parties cannot agree on the specific benefits to be provided in the future. The Appeals Board does so as an alternative to granting claimant an open-ended authority to purchase whatever boots he may prefer at whatever time he may prefer.

Finally, the Appeals Board agrees that claimant has failed to establish an underpayment of temporary total disability benefits. Claimant's testimony on this issue is summarized in the Award by the Administrative Law Judge. As the Administrative Law Judge states, the testimony is vague and fails to meet claimant's burden of establishing that the benefits were underpaid.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated April 23, 1997, entered by Administrative Law Judge Bryce D. Benedict, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Jeffrey D. Slattery, Kansas City, MO
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director